SUPREME COURT, U. S.
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-792

GAFTON I. CIURUS, et al.,

Petitioners

vs.

JACK NEW
TREASURER OF THE STATE OF INDIANA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For The Seventh Circuit

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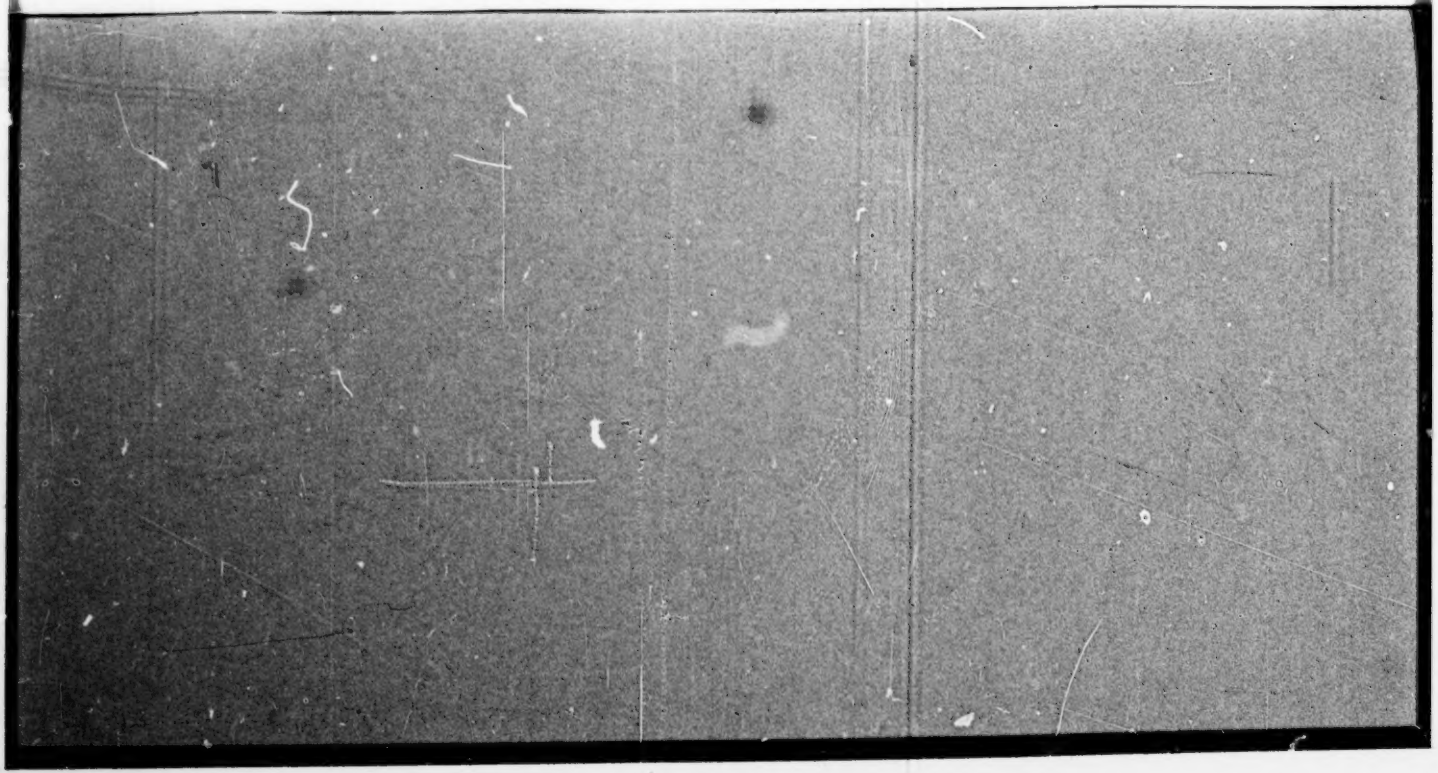

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The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on October 3, 1974.

OPINIONS BELOW

The Court of Appeals issued an unpublished order, and the District Court rendered a memorandum and opinion, unreported. Both appear in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on October 3, 1974. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The District Court held: "The only cause of action asserted by the plaintiffs is that their due process rights under the Fourteenth Amendment have been violated." and, thereupon found and held, "Since

plaintiffs cannot assert Fourteenth Amendment rights, they have failed to state a claim upon which relief can be given and the complaint must be dismissed pursuant to Rule 12(b)(6), Fed.R.Civ.P."

The Court of Appeals, in affirming the judgment below, stated: "Since the plaintiffs failed to assert their due process rights in the Jasper County Circuit Court in the almost two months between receipt of notice of the preliminary order of escheat and the reaffirmance of that order and since no appeal was taken from either of the state court decrees, we hold that the plaintiffs' action below is barred by the doctrine of res judicata."

1. Whether the Court of Appeals committed serious error in ignoring the

issue brought before it as to the propriety of the dismissal of the complaint for failure to state a claim upon which relief can be given, and, instead, in affirming the judgment below on a ground which was not ruled upon by the lower court and, therefor, not before it for review?

2. Whether the petitioners action below is barred by the doctrine of res judicata for failure to exhaust the state's appellate remedies in seeking the vindication of their Fourteenth Amendment rights?

STATUTORY PROVISIONS INVOLVED

Burns, Indiana Statutes Annotated, Section 7-1112 (a)(b) and 29-1-17-12.

STATEMENT OF THE CASE

The petitioners, as citizens and residents of Romania, filed their complaint

pursuant to Title 28 U.S.C.A. Sections 1331(a) and 1332(a) (2) against the Treasurer of the State of Indiana to recover certain funds which belonged to the estate of Thomas Ciurus, deceased, and were escheated to the State of Indiana.

The plaintiffs and defendant each filed a motion for summary judgment and the defendant also filed a motion to dismiss the complaint pursuant to Rule 12, Fed.R.Civ.P. The District Court granted the motion to dismiss on the ground that the safeguards of the Fourteenth Amendment to the Constitution of the United States are not accorded to citizens of a foreign country, not resident in the United States. However, the lower court went on to state that the due process rights of the plaintiffs were not violated.

The factual statements are set forth in the Complaint. The petitioners are the sole

heirs of Thomas Ciurus who died intestate and whose estate was administered in Jasper County, Indiana. They empowered Attorney John R. Vintilla of Cleveland, Ohio, to represent them with regard to their rights in and to the estate of the decedent. The attorney for the administrator of the estate was notified promptly of the relationship of the petitioners and of the representation of their interests by legal counsel. Thereafter, duly executed and authenticated powers of attorney and heirship documents were forwarded to the attorney for the fiduciary. These documents were prepared by, executed in the presence of, certified by the State Notary in Romania, and authenticated by the appropriate governmental officials, including the Consul of the United States in Bucharest, Romania.[1]

In due course the administrator petitioned the court for a determination of the heirs of Thomas Ciurus and informed counsel for the petitioners of the filing and of the date of the hearing thereof. Prior thereto, the attorney for the administrator wrote to petitioners' lawyer, among other things, as follows:

> ". . As soon as you have the information on the heirs as to substantiate their interests, please let me know and I will prepare a petition to determine heirship, at which time this material may be presented to the court. I personally see no problems with regard to it as long as the heirship is substantiated. We did, when the estate was opened, contact the Attorney General of the State of Indiana's office and advised them of the situation and they

[1] According to the laws of Romania, the State Notary is an integral part of the Ministry of Justice. He is entrusted with the administration of decedents' estates and has jurisdiction of other legal matters. He is a lawyer appointed to that office by the Minister of Justice, under whose jurisdiction he operates.

have been kept advised as to the developments in the estate. It appeared for a while that perhaps the State of Indiana would recover the estate by escheat. It appears that it will not be the case now, but nevertheless we should keep them advised." (par.5, Complaint).

In view of the authenticated documents establishing the heirship of the petitioners which were filed with the court, the recognition of the petitioners as the heirs by the administrator and the representation of his counsel as hereinabove set forth, the petitioners' counsel did not appear at the hearing on the petition to determine the heirs of the decedent, Thomas Ciurus. Thereafter, to their complete surprise, they learned that the Court, at the hearing to determine heirs, found that the decedent died intestate without heirs, and, thereupon and instanter, ordered the property of the estate to escheat to the State of Indiana. The petitioners did not have any notice

whatsoever that the court would hear and determine a claim for escheat in connection with the hearing on the petition to determine heirs. Moreover, the State of Indiana had not made or filed a claim for escheat, of which the plaintiffs had notice or knowledge.

The petitioners subsequently filed their complaint in the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette, pursuant to Title 28 U.S.C., Section 1331(a) and 1332(a) (2) against the Treasurer of the State of Indiana to recover the funds of the estate of their decedent which were improperly escheated to the State. The complaint alleges that the conduct and action of the State Court violated the petitioners' Fourteenth Amendment rights. The District Judge dismissed the complaint on two grounds. First, that the petitioners cannot

assert Fourteenth Amendment rights as non-resident aliens. Secondly, their proper remedy was to appeal within the state court system.

The Court of Appeals affirmed the judgment of dismissal of the District Court for the reason that the "plaintiffs action below is barred by the doctrine of res judicata."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING STATE AND FEDERAL RELATIONSHIP WITH RESPECT TO THE PROTECTION OF FEDERALLY CREATED RIGHTS OF NON-RESIDENT ALIENS.

The injustices committed upon the non-resident friendly aliens in their claim to property in the United States which has been granted or secured to them by our laws are spread upon the record of the judicial authorities throughout our land. Some of the outrages have been made evident by this court in Zschernig v. Miller, 389 U.S. 429.

This court alone interposed itself between the states and non-resident claimants to protect them from unconstitutional action under color of state law.

The lower courts, in effect, have determined that the rights asserted in the complaint by foreign nationals are not proper subject for adjudication by a Federal Court, and that the exercise of Federal jurisdiction must be declined because the rights should have been litigated in the state court. This conclusion was reached under the guise of applying established legal principles. The District Court dismissed the action by reason of a motion to dismiss for failure to state a claim upon which relief can be given pursuant to Rule 12(b)(6), Fed.R.Civ. P. The motion under 12(b)(6) performs the same function as the old general demurrer in that it admits the well pleaded material allegations of the complaint, Walker Process,

Equip.v.Food Mach.& Chem.Corp.,382 U.S.172, but denies their legal sufficiency. In view of its ruling, the District Court did not and could not consider the affirmative defense of res judicata. The error assigned for review by the Court of Appeals and the record submitted in connection with the appeal involved the legal propriety of the dismissal order as the sole issue before the court. Nevertheless, the Court of Appeals affirmed the order of dismissal by reason of the doctrine of res judicata. We do not contend, as indicated below, that federal district courts should exercise state appellate jurisdiction. This is not our situation. The federal constitutional rights which are asserted here arise as a result of the action and conduct of the state court. The subject of this action has never been adjudicated on the merits by a court of competent jurisdiction. We agree that matters purely probate in

character are not within the jurisdiction of the federal courts. The question here, however, is not one of probate, but is to determine the right to property in the possession of the State of Indiana. It has been held consistently that where diversity of citizenship and the requisite jurisdictional amount are present, federal courts will determine a controversy involving the rights of a plaintiff to share in the res. The complaint does not relate to the authority of the State court to determine heirs, or to rule upon escheat in a proper proceeding, but is directed to the judicial action and conduct of a State Judge who subjected the rights of the petitioners to unconstitutional treatment. In passing upon the sufficiency of the complaint for purpose of the motion to dismiss, the court was required to assume that the well-pleaded allegations are true. The complaint shows that the peti-

tioners' federal constitutional rights have been infringed upon or violated. A federal judicial inquiry of such a charge is proper and imperative given the requisite jurisdictional basis.

THE STATE COURT DEPRIVED THE PETITIONERS OF THEIR RIGHTFUL CLAIM TO THE SUBJECT ESTATE IN VIOLATION OF THE LAWS OF INDIANA, AND CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

The State of Indiana, as well as other states, in their generosity allow non-residents to inherit from a decedent's estate on the same basis as residents. The laws of descent and distribution in Indiana do not discriminate between a resident or a non-resident alien in his claim to the estate of an Indiana decedent. Thus, we see that Indiana accords all interested parties equal treatment before the law in the administration of a decedent's estate. The question, therefore, arises whether Indiana may deny or deprive a non-resident

alien equality of treatment in the enforcement of the rights granted and secured to him by the State. Obviously, the logical answer is in the negative. Yet, the rulings below, in effect, approved such a practice. Let us examine. On the one hand, Indiana would allow the petitioners to inherit the estate of our intestate decedent as the rightful heirs, but on the other hand, it denied them the safeguards of the laws to secure those rights. The petitioners submitted documentation, duly executed and authenticated, to establish their relationship to the decedent. The administrator, who had the primary responsibility to ascertain if there were heirs, recognized the claim of the petitioners and accepted their substantiation of same. As a result thereof, there was no reason to believe or know that the court, at the hearing on the administrator's petition to determine heirs, would not ac-

cept the documentation and the fiduciary's representation regarding the relationship of the petitioners. In any event, the State court had before it reasonable grounds to believe that the decedent did leave heirs at law who would be entitled to inherit his estate. In view thereof, the court was required at least to continue the hearing on the determination of heirs to afford the petitioners an opportunity to submit additional proof, or, in the alternative, to require the State, in seeking escheat, to satisfy the court by strong and convincing evidence that "after reasonable search" there are "no known heirs of the decedent", or that "any heir or claimant cannot be found".

The escheat statute of Indiana, Burns, Section 7-1112(a)(b), relevant hereto, provides:

> "(a) If after reasonable search, satisfactory to the Court, there shall be no known heir of the decedent.

. . . and "(b) If any heir, distributee, devisee, or claimant cannot be found after reasonable search, satisfactory to the court . . . "the estate shall escheat to the state."

The public policy of inheritance laws is to distribute property to the owners rather than to claim it by escheat. The escheat law is not like a statute that requires the forfeiture of property for some wrongful conduct. It is not designed to be an expropriation of property of foreign resident owners who are known and who can establish their property right to the fund. These principles are well established and generally accepted in all jurisdictions.

It is the settled rule that escheats and forfeiture are not favored by law, any doubt as to whether property is subject to escheat is resolved against the State, State v U.S. Steel Corporation, 12 N.J. 38, 45-95 A 2d 734. Relative to our problem, the court, in Frazier v Kutz, 139 F 2d 380, stated at page

383, as follows:

> "In every case of this nature there is a presumption of law that deceased left heirs, and this presumption obtains until the claimant by escheat overcomes the presumption by strong and convincing evidence."

It is implicit in the language of Indiana's laws of escheat that the aforementioned principles are controlling in applying the statute. It is important to note that the court is authorized to order escheat only if it is satisfied that no kindred capable of inheriting have been found after a reasonable search. Obviously, the ascertainment of the right to escheat involves a determination by the court that there is a complete failure of heirs at law or next of kin. According to the statute, escheat will not be permitted so long as a party legally authorized to inherit can be found. The court in our case had reasonable grounds to believe and to know

that there may be heirs in view of the official and authenticated documentation which was presented to it. Moreover, the fact that the administrator assumed the responsibility of presenting the documents to the court, without objection thereto, furnishes adequate proof that the party primarily responsible for distributing the estate to the rightful parties - the administrator - was satisfied that there were parties capable of inheriting. In any event, the court fell into serious error in ordering the forfeiture of the property claimed by these plaintiffs under the circumstances of this matter.

We are here concerned with the interpretation of the laws governing escheat and with the constitutional doctrine underlying such laws. Certainly, a substantial constitutional question is provoked by the state court's action of escheat. The provisions of the escheat statute of Indiana and the

court's action of escheat must be considered in light of the provisions of the Fourteenth Amendment that no person shall be deprived of property without due process of law or denied the equal protection of the laws.

The order of escheat was made at a hearing that was scheduled solely for the purpose of determining heirs. This was the only scope of the hearing at that time, at least insofar as the notice to the petitioners set forth. The Court, apparently, was of the opinion that the documents submitted to establish heirship were inadmissible, and, concluded therefrom, that the decedent left no heirs. The court then went on to decide that the estate must escheat, although the issue of escheat was not before the court at that time, and the petitioners had no notice or knowledge that the court would entertain a claim for escheat at that hearing. More

seriously, the petitioners were not accorded an opportunity to appear and to defend upon the claim of escheat. This is a classic example of a denial of procedural due process. (See In The Matter of Ruffalo, 390 U.S. 544).

We submit, under the provisions of the Indiana law, that the state treasurer is a mere trustee of the subject funds until the expiration of seven (7) years from the time of payment. The state becomes entitled to the estate of an intestate only where there is no heir capable of inheriting, and title to such property does not vest in the state until the expiration of a period of seven years after payment to the state treasurer. Thus, we see that Indiana law authorizes suit against the State Treasurer to recover the escheated property. Such a provision is common in an escheat statute.

The rationale of the lower court's decision is that a party whose documented claim

to a decedent's estate had been accepted by the fiduciary, and for which reason he did not appear at the hearing to determine heirs, is nevertheless deemed for the purposes of due process to be on notice of possible escheat in the same proceeding. This reasoning has been rejected by this Court in Griffin v Griffin, 327 U.S. 220. While it is true that the petitioners had notice of the heirship proceedings and an opportunity to appear therein, the order of escheat is constitutionally invalid when made without any prior notice that a claim for escheat would be made and would be acted upon by the court in connection with proceedings to determine heirs. The action of the state court cut off any opportunity for the petitioners to corroborate the heirship claim and denied them the right to resist and defend against the claim for escheat. These rights could not be rendered nugatory by a

failure to give them notice and to afford them an opportunity to be heard with regard thereto. It runs counter to the requirements of due process to make an order which undertook to prejudice the rights of a party in a way that he had no reason to expect. Certainly, the laws of Indiana do not provide that a claim for escheat must automatically follow a proceeding to determine heirs in the circumstances of our case. On the contrary, Indiana views escheat as a drastic measure in the traditional concept of established and accepted rules, and to be resorted to only when the court is satisfied that there is no heir who can be found to claim the estate. This is hardly the situation of the within cause. In addition, the law places the burden upon the State to establish the right to escheat by strong and convincing proof. Implicit in such a requirement is the right of a putative heir

to challenge the claim in a judicial proceeding of which he has notice and an opportunity to appear.

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act". (underscoring supplied)
> Lambert v California 355 U.S. 225, 228.

The Court of Jasper County, Indiana, is charged with the duty of protecting and preserving the rights of all claimants of a decedent's estate. Basic thereto, is the correlative duty to notify all parties in interest of each and every proceeding that may affect their rights, and to afford them an opportunity to appear to protect their rights. The action of the State court was extremely drastic, unusually abrupt and grossly unfair. Fairness of procedure is one of the rudiments

of due process. This fundamental concept is the basis upon which every judicial action must rest. A judgment based upon conduct and action as is evident in our situation is constitutionally repugnant. See Societe Internationale v Rogers, 357 U.S. 197 at page 209.

CONCLUSION

The decision below is inconsistent with, and in disregard of, the constitutionally protected rights of the petitioners. The writ should issue to review the order of the Seventh Circuit.

Respectfully submitted,

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Attorney for Petitioners

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION AT LAFAYETTE. CIV. NO. 73 L 33

COMPLAINT

GAFTON A. CIURUS, et al.,
Plaintiffs

v.

JACK NEW. Treasurer of the State of Indiana,
Defendant

1) Plaintiffs are citizens and residents of Romania. They bring their action under Title 28, U.S.C.A., Sections 1331(a) and 1332(a)(2). The defendant is the Treasurer of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

2) The plaintiffs are the heirs at law of Thomas Ciurus, deceased, who died on or about September 28, 1970, a resident of Jasper County, Indiana. The estate of Thomas Ciurus was administered in the Circuit Court

of Jasper County, Indiana, be[redacted]cause number 4479 therein.

3) The plaintiffs, resp[redacted]vely, duly executed a power of attorney whereby they empowered and authorized John R. Vintilla, attorney at law, Cleveland, Ohio, to represent them, and to act on their behalf and in their name, place and stead in connection with and in regard to their rights and interests as heirs of Thomas Ciurus, deceased, and as distributees of the estate of said decedent.

4) The said attorney notified the administrator of the estate, and his attorney. of his representation of the heirs in Romania, and thereafter, the attorney for the fiduciary kept the attorney for these plaintiffs informed of all proceedings affecting their interests during the administration of the estate.

5) On March 10, 1971, Thomas G. Fisher,

the attorney for the administrator of the subject estate, wrote to the attorney for the plaintiffs, among other things, as follows:

> "It was a pleasure talking with you on the phone last Monday, and I thought I would bring you up to date in the matter of the estate. Enclosed please find a copy of the inventory filed showing the assets which Mr. Ciurus owned at his death. The contract noted has been compromised for the sum of $3,000.00 inasmuch that if the contract were to be paid out it would be eight or nine years before final payment would be made. This was done with Court approval. We plan now to sell the farmland above noted for not less than the appraised value. You will be receiving a notice of the hearing on the petition to sell real estate shortly, and, if you at that time have the power of attorney on behalf of the putative heirs of Thomas Ciurus, deceased, we would appreciate a waiver of notice and consent to the sale or, naturally, if you have objections to the sale those objections should be heard at the hearing. . As soon as you have the information on the heirs as to substantiate their interests please let me know and I will prepare a petition to determine heirship, at which time this material may be presented to the Court. I personally see no problems with regard to it as long as the heirship is substantiated. We did, when the estate was opened, contact the Attorney General of the State of Indiana's office and ad-

vised them of the situation and they have been kept advised as to the developments in the estate. It appeared for a while that perhaps the State of Indiana would receive the estate by escheat. It appears that it will not be the case now, but nevertheless we should keep them advised."

6) The plaintiffs, through their attorney, forwarded to legal counsel for the administrator, on July 2, 1971, copies, and on July 13, 1971, the originals of a set of documents consisting of a Declaration of Heirship and Powers of Attorney, all of which have been prepared and executed in accordance with the laws of Romania, and duly authenticated by the appropriate Romanian authorities and by the Consul of the United States of America at Bucharest, Romania, copies of which are annexed hereto, and made a part hereof, as though fully set forth herein, marked exhibits A, B, C and D. The documentation as evidenced by these exhibits were filed with the court in the subject estate.

7) At all times relevant to the admin-

intration proceedings of the estate, the administrator of the estate knew, or had reasonable cause to believe, that the plaintiffs are the heirs of the decedent as substantiated by the official documents referred to hereinabove.

8) On November 22, 1971, the petition to determine heirship, filed by the administrator of the estate, came on for hearing, at which time the court had before it the documentation referred to in paragraph 6, containing duly authenticated evidence setting forth the relationship of the plaintiffs to the subject decedent, that notwithstanding the fact that there were reasonable grounds to believe that the decedent did not die without heirs, the court, nevertheless entered a decree forthwith whereby it ordered that the net assets in the hands of the administrator be, and same were, distributed to the State of Indiana as escheated property.

Exhibit E attached hereto.

9) In view of the duly authenticated documentation before the court regarding the heirship of these plaintiffs, and the representations of the attorney for the administrator, as aforesaid, the attorney for the plaintiffs was caused to believe, and did believe, that it was not imperative to appear and, therefore, did not appear, at the hearing scheduled to determine heirs on November 22, 1971.

10) Plaintiffs had no reason to believe or to know, nor did they have any notice or knowledge, whatsoever, that a claim for escheat would be made, or that the court would entertain such a claim at the hearing of November 22, 1971, and therefore, they were afforded no opportunity to appear and to protect their rights against such a claim.

11) As a direct result of the aforementioned action of the court, the plaintiffs

were denied their rightful inheritance from the estate of Thomas Ciurus, that the total property which they would have inherited as sole heirs, but for escheat, was approximately twenty thousand dollars ($20,000.00), the exact amount being unknown to the plaintiffs for the reason that they did not receive a copy of the distributive account of the fiduciary.

12) The judgment complained of herein deprived the plaintiffs of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore plaintiffs pray that this court determine that they are the rightful heirs at law of Thomas Ciurus, deceased, and, as such, entitled to the entire distributive estate, with interest at the legal rate from the date of escheat, for their costs herein, and for such other relief as may be just and proper in the premises.

UNITED STATES DISTRICT COURT
Memorandum of Decision and Order

This cause is before the court on plaintiffs' motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P.,and defendant's motion for summary judgment pursuant to Rule 56, Fed. R.Civ.P., and motion to dismiss pursuant to Rule 12,Fed.R.Civ.P. Since this court has determined that the defendant's motion to dismiss will be granted, no decision will be reached on the motions for summary judgment. The facts as alleged in the complaint are as follows. Plaintiffs are citizens and residents of Romania. Plaintiffs claim to be the heirs of Thomas Ciurus, who died in 1970, a resident of Jasper County, Indiana. Plaintiffs executed a power of attorney whereby they authorized John R. Vintilla, an attorney, to reresent them and to act on their behalf in regard to their rights and interests in the estate of Thomas Ciurus. On November 22, 1971,

a hearing was held before the Jasper Circuit Court on a petition to determine heirship filed by the administrator of the estate of Thomas Ciurus. Although plaintiffs' attorney did not appear, the court had before it documentation regarding the heirship of these plaintiffs. These documents had been provided by plaintiffs' counsel and were presented to the court by Thomas G. Fisher, attorney for the administrator. The court decided that the documents were not sufficient proof of heirship and ordered the property of Thomas Ciurus be distributed to the State of Indiana. The instant action was filed on September 21, 1973, basing jurisdiction on 28 U.S.C.A. Sec. 1331(a) and 1332(a)(2). The complaint alleged that the Jasper Circuit Court deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Plaintiffs' attorney had been advised

by the attorney for the administrator, Thomas G. Fisher, that he (Fisher) personally saw no problem with regard to determining heirship of the plaintiffs as long as such heirship was substantiated. Fisher also informed plaintiffs' attorney that it had formerly appeared that the State of Indiana would take the estate by escheat but that no longer appeared to be the case. Yet Fisher counseled keeping the State advised of developments nevertheless. Plaintiffs' attorney states that because of the above representations of Fisher and because the documents regarding heirship were before the court, he did not believe it was imperative to appear at the hearing to determine heirship. He claims that plaintiffs had no notice or reason to believe that a claim for escheat would be made. Therefore, it is alleged that plaintiffs were afforded no opportunity to appear and protect their rights against such

a claim. As a result, plaintiffs allege that they were deprived of their inheritance from the estate of Thomas Ciurus and that this deprivation violated their Fourteenth Amendment rights. On October 12, 1973, plaintiffs moved for a summary judgment on the ground that no issue of material fact existed and that plaintiffs had been denied due process as a matter of law.

On the same day, defendant moved to dismiss the action, stating that the court lacked subject matter jurisdiction, that plaintiffs failed to state a claim upon which relief can be granted, that the Eleventh Amendment prohibited suits of this nature, and that the court should abstain from hearing of a case of this nature. On November 21, 1973, defendant moved for summary judgment, asserting that the decision in the Jasper Circuit Court, from which no appeal was taken, was a bar to the instant action.

The only cause of action asserted by plaintiffs is that their due process rights under the Fourteenth Amendment have been violated. The relevant part of the Fourteenth Amendment provides that:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . . (emphasis added)

The question presented to this court is whether the words "any person" grant due process rights to citizens of foreign nations not residing in the United States. This court concludes that plaintiffs cannot assert Fourteenth Amendment rights since the words "any person" apply only to citizens of the United States and aliens residing in the United States. Graham v. Richardson, 403 U.S. 365, 371, 91 C.Ct. 1848, 1951 (1971): Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064(1886); Cermeno-Cerna v. Farrell, 291 F. Supp. 521 (D. D. Cal. 1968). See also 3 Am. Jur. 2d

Aliens and Citizens Sec.8 (1962); 16 Am.Jur. 2d Constitutional Law Sec.558 (1964). Since plaintiffs cannot assert Fourteenth Amendment rights, they have failed to state a claim upon which relief can be given and the complaint must be dismissed pursuant to Rule 12 (b)(6), Fed.R.Civ.P.[1]

In addition, it is quite clear that plaintiffs were accorded due process in the hearing to determine heirship. He had been told that the State must be kept informed because it had a possible escheat claim.

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[1]The Court has taken note of the Protocol to the Consular Convention Between the United States of America and the Socialist Republic of Romania attached to plaintiffs' brief in opposition to the motion to dismiss. However, the Protocol does not in any way alter the court's decision to dismiss the action. The decedent died in September 1970 and the decision of the Jasper Circuit Court which is challenged in the instant action was entered in November 1972. The Consular Convention did not enter into force until July 1973, well after the decedent's death and subsequent to the state court decision and does not apply to the instant action. Since

As an attorney he must have been aware that if no heirs were found, the property would escheat to the State. Knowing all this, he chose not to attend the hearing. When the court ruled adversely to his clients, he chose not to file a Motion to Correct Errors pursuant to Indiana Trial Rule 59 or to take an appeal. In light of the above facts, plaintiffs cannot be heard to say that they had no reason to believe that a claim for escheat would be made or that they were not afforded an opportunity to appear and protect their rights. If the Jasper Circuit Court erred, the proper remedy was an appeal within the state court system and not a suit in this court.

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this action was brought solely under the Fourteenth Amendment, this court expresses no opinion as to whether plaintiffs have a viable cause of action under any international agreement between the United States and Romania.

For the above reasons defendant's motion to dismiss is granted. No decision is reached on plaintiffs' motion for summary judgment or defendant's motion for summary judgment. This cause is now dismissed.

Entered this 25th day of January, 1974.

/s/ Jesse E. Eschbach
District Judge

UNITED STATES COURT OF APPEALS
Seventh Circuit

October 3, 1974

ORDER

Plaintiffs are citizens and residents of Romania and claim to be the heirs of Thomas Ciurus, who died on September 28,1970, as a resident of Jasper County, Indiana. Plaintiffs authorized a Cleveland, Ohio lawyer to represent them with respect to the Ciurus estate. On November 22, 1971, the petition to determine heirship came on for a hearing. Plaintiffs' counsel had notice of the hearing but did not appear. On that date, a judge of the Jasper Circuit Court found that there was insufficient proof as to the heirs of the deceased and therefore held that the property escheated to the State of Indiana. A final decree to that effect was entered on January 17,1972. On July 24, 1973, the same court denied a petition

of the State Bank of Remington, Indiana, seeking to require the Treasurer of the State of Indiana to pay the escheated monies to the bank as receiver for the deceased's Romanian heirs. The Treasurer of the State of Indiana was a respondent to the petition for a receiver and was represented by deputy attorneys general of the State of Indiana. The present complaint was filed on September 21, 1973, almost sixty days after the denial of the receiver's petition.

The district court granted the defendant's motion to dismiss on three grounds:

1. Plaintiffs cannot assert that their due process rights were violated in the Indiana proceedings because the Fourteenth Amendment applies only to citizens of the United States and aliens residing therein.

2. Plaintiffs were accorded due process in the state proceedings.

3. If the Jasper Circuit Court erred,

the proper remedy was an appeal within the state court system.

Plaintiffs and the defendant treasurer were parties in the Indiana litigation. Since plaintiffs failed to assert their due process rights in the Jasper County Circuit Court in the almost two months between receipt of notice of the preliminary order of escheat and the reaffirmance of that order and since no appeal was taken from either of the state court decrees, we hold that the plaintiffs' action below is barred by the doctrine of res judicata. As the Second Circuit noted recently in a somewhat similar case, Lovely v. Laliberte, 498 F.2d 1261, 1263 (2d Cir. 1974), "(R)es judicata, (even in the context of constitutional claims), bars all grounds that might have been, but were not, presented to the state court." Furthermore, the Supreme Court, in Rooker v. Fidelity Trust Company, 263 U.S. 413, indicated that

federal district courts are not to exercise state appellate jurisdiction. Plaintiffs' remedy was in the Indiana courts.

Judgment affirmed.

BEFORE

THOMAS E. FAIRCHILD, Circuit Judge

WALTER J. CUMMINGS, Circuit Judge

WILBUR F. PELL, JR., Circuit Judge

(d) The moneys received by the state treasurer pursuant to the provisions of this section shall be paid to the person entitled on proof of his right thereto or in the case of an absentee, to the receiver of such absentee's property, or, if the state treasurer refuses or fails to pay because he is doubtful as to his duties in the premises, such person may apply to the court in which the estate was administered, whereupon the court upon noyice to the state treasurer may determine the person entitled hereto and order the treasurer to pay the same accordingly. No interest shall be allowed thereon and such distributee or claimant shall pay all costs and expenses incident to the proceedings. If such proceeds are not paid or no application is made to the court within seven (7) years after such payment to the

state treasurer, no recovery thereof shall be had.

FILED
JAN 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-792

GAFTON I. CIURUS, *et al.*,
Petitioners,

vs.

JACK NEW, TREASURER OF THE
STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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GAFTON I. CIURUS, *et al.*
Petitioners,

vs.

JACK NEW, TREASURER OF THE STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Jack New, Treasurer of the State of Indiana, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 74-1251 on October 3, 1974.

OPINION BELOW

The opinion of the Seventh Circuit was rendered in an order that, pursuant to Circuit Rule 28 of the Seventh Circuit, was not to be published. That opinion has been

appended hereto as Appendix A. The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, cause number 73 L 33, was issued on January 25, 1974, and is unreported. That decision is appended hereto as Appendix B.

JURISDICTION

Petitioners allege jurisdiction in this Court pursuant to 28 U.S.C. § 1254(1). However, Petitioners have not shown this Court which of the applicable paragraphs of Rule 19 of the Rules of this Court apply to the Petition for Writ of Certiorari (hereafter Petition).

The Respondent would assert that there is no jurisdiction in this Court to issue the writ prayed for since there is no federal question involved, no decision issued in conflict with applicable decisions of this Court or any decision in conflict with decisions of other circuits. In fact, the issues involved herein have been entirely foreclosed by this Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

QUESTIONS PRESENTED FOR REVIEW

The Respondent would assert that the sole issue presented to this Court is:

1. Whether the Seventh Circuit erred in holding that the Petitioners/Plaintiffs remedy was in the Indiana Courts?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Fourteenth Amendment to the Constitution of the United States provides in section 1:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Trial Rule 59 of the Indiana Rules of Trial Procedure provides, in part:

> (A) The Court upon its own motion or the motion of any of the parties for or against all of the parties and upon all or part of the issues shall enter an order for the correction of errors occurring prior to the filing thereof, ...
>
> (C) A motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment ...
>
> (G) In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court. A motion to correct errors shall not be required in the case of appeals from interlocutory orders, orders

appointing or refusing to appoint a receiver, and from orders in proceedings supplemental to execution.

STATEMENT OF THE CASE

I.

Nature of the Case

This Petition, filed by Petitioners (Plaintiffs below) who are citizens and residents of Romania, arises from a case where the Plaintiffs sought to have the District Court determine that they were the rightful heirs to the property of one Thomas Ciurus, deceased. The Plaintiffs alleged in the District Court that they had been denied their property by the Circuit Court of Jasper County, Indiana without due process of law as provided by the Fourteenth Amendment to the Constitution of the United States, since the property of Thomas Ciurus, deceased, had escheated to the State of Indiana.

II.

Course of Proceedings Below

Petitioners filed their Complaint in the District Court on September 21, 1973, alleging jurisdiction in that Court pursuant to 28 U.S.C. §§ 1331(a) and 1332(a)(2).

On October 12, 1973, the Defendant below (Respondent herein), filed a Motion to Dismiss with a supporting Memorandum, asserting that the District Court lacked subject matter jurisdiction and the Complaint failed to state a claim upon which relief could be granted.

Also on October 12, 1973, the Plaintiffs filed a Motion for Summary Judgment with counsel's supporting affidavit stating that certain documents attached and others

referred to in the Complaint were true and correct copies of the original documents. Plaintiffs also filed a "Trial Brief."

On or about October 22, 1973, Plaintiffs mailed their "Brief in Opposition to Motion to Dismiss" to the Court, to which the Defendant filed a Reply on November 5, 1973.

On November 21, 1973, Defendant filed his "Response to Plaintiffs' Motion for Summary Judgment" and "Motion for Summary Judgment."

The District Court issued its "Memorandum of Decision and Order" on January 25, 1974, dismissing Plaintiffs' Complaint for failure to state a claim upon which relief could be granted since Plaintiffs, as foreign citizens not residing in the United States, were not persons within the meaning of the Fourteenth Amendment, and since the Plaintiffs had been fully accorded "due process" in the state courts. See page A-7 of Appendix B.

On or about February 19, 1974, Plaintiffs filed their "Notice of Appeal" to the Seventh Circuit. In that Court the Plaintiffs asserted two issues:

1. Are the plaintiffs, as non-resident aliens, entitled to the protection of the Fourteenth Amendment to the Constitution of the United States?

2. If the answer to question number one is in the affirmative, is the State court's judgment of escheat contrary to the Fourteenth Amendment rights of the plaintiffs?

The Seventh Circuit heard oral argument on September 16, 1974, and issued its opinion on October 3, 1974, holding that since no appeal was taken from two Indiana state court proceedings involving the issues raised therein by

Petitioners, the action was barred by the doctrine of *res judicata*. The Court then noted that federal district courts are not to exercise appellate jurisdiction over state courts, and that Plaintiffs' remedy was therefore in the Indiana Courts. See pages A-2 and A-3 of Appendix A.

III.

Facts Relevant to Issues Presented for Review

The estate of Thomas Ciurus, deceased, was administered in the Jasper County Circuit Court, captioned "In the Matter of the Estate of Thomas Ciurus, deceased by Paul Cutean, Administrator," cause number 4479. Plaintiffs submitted certain documents to that Court apparently designed to show that they were the heirs of the decedent. On November 22, 1971, that Court ruled against the plaintiffs. On January 17, 1972, the Jasper Circuit Court entered a final decree in that estate stating that all property was to go to the State of Indiana. No motion to correct errors, pursuant to TR. 59 of the Indiana Rules of Trial Procedure, was filed.

Thereafter on May 11, 1973, various petitions were filed with the Jasper Circuit Court seeking to have the money previously ordered paid to the State of Indiana now paid to the plaintiffs. The plaintiffs were specifically mentioned in the petitions as purported heirs.

A hearing was held on the petitions on June 25, 1973, and on July 24, 1973, the Jasper Circuit Court entered its "Memorandum Decision and Order Denying Petition." A Motion to Correct Errors under TR. 59 of the Indiana Rules of Trial Procedure was never filed by the plaintiffs as a result of the denial of the petitions, and consequently no appeal was taken. Instead, plaintiffs filed their Complaint in the District Court on September 21, 1973, or three

(3) days prior to the expiration of the sixty (60) day period allowed for filing a Motion to Correct Errors.

Thus, the issue that plaintiffs sought to have the District Court consider had been litigated in the Jasper Circuit Court adversely to plaintiffs and no appeal was taken. That judgment was therefore *res judicata* to the District Court.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT DID NOT ERR IN HOLDING THAT PETITIONERS' REMEDY WAS IN THE INDIANA STATE COURTS

Petitioners assert on page 11 of their Petition that:

> "The lower courts, in effect, have determined that the rights asserted in the complaint by foreign nationals are not proper subject for adjudication by a Federal Court, and that the exercise of Federal jurisdiction must be declined *because the rights should have been litigated in the state court . . .*" (Emphasis Supplied)

This is not an accurate statement of the holdings of either the District Court or the Seventh Circuit since those rights were fully litigated in the state court.

In its Decision of January 25, 1974, the District Court stated:

> "The only cause of action asserted by plaintiffs is that their due process rights under the Fourteenth Amendment have been violated. The relevant part of the Fourteenth Amendment provides that:
>
> > . . . nor shall any State deprive *any person* of life, liberty or property, without due process of law.... (emphasis added).

> The question presented to this court is whether the words "any person" grant due process rights to citizens of foreign nations not residing in the United States. This court concludes that plaintiffs cannot assert Fourteenth Amendment rights since the words "any person" apply to citizens of the United States and aliens residing in the United States. *Graham v. Richardson,* 403 U.S. 365, 371, 9 S.Ct. 1848, 1951 (1971); *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886); *Cermeno-Cerna v. Farrell,* 291 F. Supp. 521 (C. D. Cal. 1968). See also 3 Am. Jur. 2d *Aliens and Citizens* § 8 (1962); 16 Am. Jur. 2d *Constitutional Law* § 558 (1964) ...
>
> In addition, it is quite clear that plaintiffs were accorded due process in the state action. Their attorney was notified of the hearing to determine heirship. He had been told that the State must be kept informed because it had a possible escheat claim. As an attorney he must have been aware that if no heirs were found, the property would escheat to the State. Knowing all this, he chose not to attend the hearing. When the court ruled adversely to his clients, he chose not to file a Motion to Correct Errors pursuant to Indiana Trial Rule 59 or to take an appeal. In light of the above facts, plaintiffs cannot be heard to say that they had no reason to believe that a claim for escheat would be made or that they were not afforded an opportunity to appear and protect their rights. If the Jasper Circuit Court erred, the proper remedy was an appeal within the state court system and not a suit in this court."

As stated by the District Court, the Petitioners have in fact received due process in this matter. They were aware that the estate was open for administration, and they retained counsel to represent them. In that regard counsel filed some documents, apparently designed to prove heirship in the Petitioners.

On page seven of their Petition the Petitioners acknowledge that the administrator of the estate petitioned the Jasper Circuit Court for a determination of the heirs of the decedent, and a hearing was set on that petition. This obviously was an important stage of proceedings in that case, yet their counsel chose not to attend that hearing.

The Petitioners admit that they had notice of the hearing on the petition to determine heirs, but attempt to argue that they did not know an escheat would take place, and that therefore, they were denied due process. Obviously, the two possible decisions that the Court could have made regarding heirship were that the decedent either died with heirs or without heirs, and the purpose of the hearing was to assist the Court in that decision. If the decedent died without heirs, then, as counsel for Petitioners surely will admit, an escheat to the state would take place.

Thus, in realty, Petitioners are arguing simply that the Jasper Circuit Court found that they were not to be declared the heirs of the decedent, and even though they chose not to attend the hearing for that determination, that determination constituted a denial of due process. The Respondent would submit that this is an untenable position.

In addition, Petitioners had a complete and actual remedy in the Indiana State courts, but did not avail themselves of that remedy. They did not file a Motion to Correct Errors as required by TR. 59 of the Indiana Rules of Trial Procedure after the Jasper Circuit Court issued its final decree on January 17, 1972. Thereafter, on May 11, 1973, or some sixteen (16) months later, certain petitions were filed to have the money previously paid to the State now paid to the Petitioners. When those petitions were denied on July 24, 1973, Petitioners again did not

file a motion to Correct Errors within the sixty (60) day time limit.

Instead of filing their motion to correct errors after the decision of the Jasper Circuit Court, the Petitioners filed the action in the District Court. Thus, the Decision of the Jasper Circuit Court is a final, uncontested decision and was binding on the District Court as *res judicata.* In the District Court action the parties were the same, the subject matter was the same and the issues were the same as in the state court. Since the matter has been determined by a Court of competent jurisdiction, the matter is *res judicata.* See *Linville v. Chenoweth,* (Ind.App., 1949) 84 N.E. 2d 473; *Brown v. Briggs,* 292 P. 2d 385 (1956); *Viles v. Prudential Ins. Co. of America,* (C.C.A. Colo., 1941) 124 F. 2d 78. Cert. denied 315 U.S. 816.

In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), this Court said at pages 415 and 416:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; and that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. *Elliott v. Piersol,* 1 Pet. 328, 340; *Thompson v. Tolmie,* 2 Pet. 157, 169; *Voorhees v. Bank of United States,* 10 Pet. 449, 474; *Cornett v. Williams,* 20 Wall.

> 226, 249; *Ex parte Harding,* 120 U.S. 782. Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, § 237, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, § 24. Besides, the period within which a proceeding might be begun for the correction of errors such as charged in the bill had expired before it was filed, Act September 6, 1916, c. 448 § 6, 39 Stat. 726, and, as is pointed out in *Voorhees v. Bank of United States, supra,* after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly."

The Respondent would assert that the issues involved herein have been entirely foreclosed by the *Rooker* case. Thus, Petitioners argument on page 13 of the Petition that:

> ". . . The question here, however, is not one of probate, but is to determine the right to property in the possession of the State of Indiana . . ."

attempts to draw a distinction that cannot be made. The question here is precisely one of probate. The Petitioners have been challenging, through three courts, the authority of the Jasper Circuit Court to determine heirs to an estate, and their failure to pursue their alleged claim through the Indiana courts does not give rise to a case in the federal courts alleging a denial of due process of law pursuant to the Fourteenth Amendment to the Constitution of the United States. As this Court has consistently recognized, the federal judiciary must generally assume:

> ". . . that state courts . . . will observe constitutional limitations as expounded by this Court, and that the

> mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski v. Pfister*, 380 U.S. 479, 484-485 (1965).

See also *Rooker v. Fidelity Trust Co., supra*, at 415.

A further reason why Petitioners should have pursued their alleged claim in the state courts is the Eleventh Amendment to the Constitution of the United States which bars jurisdiction of this matter in the federal judiciary. The Respondent asserted his Eleventh Amendment defense in both Courts below, and would reassert that position here.

This suit in the District Court was brought by citizens and residents of a foreign state, Romania, against a nominal state defendant to compel the State of Indiana to pay money to the plaintiffs. Such an action is a classic example for the Eleventh Amendment bar. See generally *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945); *Edelman v. Jordan*, 94 S. Ct. 1347, 1356 (1974).

In addition to the jurisdictional bar of the Eleventh Amendment, the Petition herein should also be denied since Petitioners have failed to advance any question that is reviewable by this Court. Rule 19(b) of the Rules of this Court lists the decisions of a court of appeals that are reviewable by a petition for writ of certiorari, and the alleged issues herein fail to comply with the issues advanced in that rule.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 28

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Argued September 16, 1974
October 3, 1974

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

GAFTON I. CIURUS, et al.,
Appellants,

No. 74-1251

vs.

JACK NEW, Treasurer,
State of Indiana
Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette.
Civ. No. 73 L 33
Jesse E. Eschbach, Judge

ORDER

Plaintiffs are citizens and residents of Romania and claim to be the heirs of Thomas Ciurus, who died on September 28, 1970, as a resident of Jasper County, Indiana. Plaintiffs authorized a Cleveland, Ohio, lawyer to represent them with respect to the Ciurus estate. On November 22, 1971, the petition to determine heirship came on for a hearing. Plaintiffs' counsel had notice of the hearing but did not appear. On that date, a judge of the Jasper Circuit Court found that there was insufficient proof as to the heirs of the deceased and therefore held that the property escheated to the State of Indiana. A final decree

to that effect was entered on January 17, 1972. On July 24, 1973, the same court denied a petition of the State Bank of Remington, Indiana, seeking to require the Treasurer of the State of Indiana to pay the escheated monies to the bank as receiver for the deceased's Romanian heirs. The Treasurer of the State of Indiana was a respondent to the petition for a receiver and was represented by deputy attorneys general of the State of Indiana. The present complaint was filed on September 21, 1973, almost sixty days after the denial of the receiver's petition.

The district court granted the defendant's motion to dismiss on three grounds:

1. Plaintiffs cannot assert that their due process rights were violated in the Indiana proceedings because the Fourteenth Amendment applies only to citizens of the United States and aliens residing therein.

2. Plaintiffs were accorded due process in the state proceedings.

3. If the Jasper Circuit Court erred, the proper remedy was an appeal within the state court system.

Plaintiffs and the defendant treasurer were parties in the Indiana litigation. Since plaintiffs failed to assert their due process rights in the Jasper County Circuit Court in the almost two months between receipt of notice of the preliminary order of escheat and the reaffirmance of that order and since no appeal was taken from either of the state court decrees, we hold that the plaintiffs' action below is barred by the doctrine of *res judicata*. As the Second Circuit noted recently in a somewhat similar case, *Lovely v. Laliberte*, 498 F.2d 1261, 1263 (2d Cir. 1974), "[R]es judicata, [even in the context of constitutional claims], bars all grounds that might have been, but were not, presented to the state court." Furthermore, the Supreme

Court, in *Rooker v. Fidelity Trust Company*, 263 U.S. 413, indicated that federal district courts are not to exercise state appellate jurisdiction. Plaintiffs' remedy was in the Indiana courts.

Judgment affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

FILED Jan. 25, 1974 at ———— M
Francis T. Grandys, Clerk

GAFTON I. CIURUS, ET AL., *Plaintiffs,*	)	
v.	)	CIVIL NO. 73 L 33
JACK NEW, Treasurer of the State of Indiana, Indianapolis, Indiana, *Defendant.*	)	

MEMORANDUM OF DECISION AND ORDER

This cause is before the court on plaintiffs' motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and defendant's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and motion to dismiss pursuant to Rule 12, Fed. R. Civ. P. Since this court has determined that the defendant's motion to dismiss will be granted, no decision will be reached on the motions for summary judgment.

The facts, as alleged in the complaint, are as follows. Plaintiffs are citizens and residents of Romania. Plaintiffs claim to be the heirs of Thomas Ciurus, who died in 1970, a resident of Jasper County, Indiana. Plaintiffs executed a power of attorney whereby they authorized John R.

Vintilla, an attorney, to represent them and act on their behalf in regard to their rights and interests in the estate of Thomas Ciurus. On November 22, 1971, a hearing was held before the Jasper Circuit Court on a petition to determine heirship filed by the administrator of the state of Thomas Ciurus. Although plaintiffs' attorney did not appear, the court had before it documentation regarding the heirship of these plaintiffs. These documents had been provided by plaintiffs' counsel and were presented to the court by Thomas G. Fisher, attorney for the administrator. The court decided that the documents were not sufficient proof of heirship and ordered that the property of Thomas Ciurus be distributed to the State of Indiana.

The instant action was filed on September 12, 1973, basing jurisdiction on 28 U.S.C.A. §§ 1331(a) and 1332(a)(2). The complaint alleged that the "judgment" of the Jasper Circuit Court deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Plaintiffs' attorney had been advised by the attorney for the administrator, Thomas G. Fisher, that he (Fisher) personally saw no problem with regard to determining heirship of the plaintiffs as long as such heirship was substantiated. Fisher also informed plaintiffs' attorney that it had formerly appeared that the State of Indiana would take the estate by escheat but that no longer appeared to be the case. Yet Fisher counseled keeping the State advised of developments nevertheless. Plaintiffs' attorney states that because of the above representations of Fisher and because the documents regarding heirship were before the court, he did not believe it was imperative to appear at the hearing to determine heirship. He claims that plaintiffs had no notice or reason to believe that a claim for escheat would be made. Therefore, it is alleged that plaintiffs were afforded no opportunity to appear

and protect their rights against such a claim. As a result, plaintiffs allege that they were deprived of their inheritance from the estate of Thomas Ciurus and that this deprivation violated their Fourteenth Amendment rights. On October 12, 1973, plaintiffs moved for a summary judgment on the ground that no issue of material fact existed and that plaintiffs had been denied due process as a matter of law.

On the same day, defendant moved to dismiss the action, stating that the court lacked subject matter jurisdiction, that plaintiffs failed to state a claim upon which relief can be granted, that the Eleventh Amendment prohibited suits of this nature, and that the court should abstain from hearing a case of this nature. On November 21, 1973, defendant moved for summary judgment, asserting that the decision in the Jasper Circuit Court, from which no appeal was taken, was a bar to the instant action.

The only cause of action asserted by plaintiffs is that their due process rights under the Fourteenth Amendment have been violated. The relevant part of the Fourteenth Amendment provides that:

> . . . nor shall any State deprive *any person* of life, liberty or property, without due process of law. . . . (emphasis added)

The question presented to this court is whether the words "any person" grant due process rights to citizens of foreign nations not residing in the United States. This court concludes that plaintiffs cannot assert Fourteenth Amendment rights since the words "any person" apply only to citizens of the United States and aliens residing in the United States. *Graham v. Richardson*, 403 U.S. 365, 371, 91 S.Ct. 1848, 1951 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886); *Cermeno-Cerna v. Farrell*, 291

F. Supp. 521 (C.D.Cal. 1968). See also 3 Am. Jur.2d *Aliens and Citizens* § 8 (1962); 16 Am.Jur.2d *Constitutional Law* § 558 (1964). Since plaintiffs cannot assert Fourteenth Amendment rights, they have failed to state a claim upon which relief can be given and the complaint must be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.[1]

In addition, it is quite clear that plaintiffs were accorded due process in the state action. Their attorney was notified of the hearing to determine heirship. He had been told that the State must be kept informed because it had a possible escheat claim. As an attorney he must have been aware that if no heirs were found, the property would escheat to the State. Knowing all this, he chose not to attend the hearing. When the court ruled adversely to his clients, he chose not to file a Motion to Correct Errors pursuant to Indiana Trial Rule 59 or to take an appeal. In light of the above facts, plaintiffs cannot be heard to say that they had no reason to believe that a claim for escheat would be made or that they were not afforded an opportunity to appear and protect their rights. If the Jasper Circuit Court erred, the proper remedy was an

---

[1] The court has taken note of the Protocol to the Consular Convention Between the United States of America and the Socialist Republic of Romania attached to plaintiffs' brief in opposition to the motion to dismiss. However, the Protocol does not in any way alter the court's decision to dismiss the action. The decedent died in September 1970 and the decision of the Jasper Circuit Court which is challenged in the instant action was entered in November 1972. The Consular Convention did not enter into force until July 1973, well after the decedent's death and subsequent to the state court decision and does not apply to the instant action.

Since this action was brought solely under the Fourteenth Amendment, this court expresses no opinion as to whether plaintiffs have a viable cause of action under any international agreement between the United States and Romania.

appeal within the state court system and not a suit in this court.

For the above reasons defendant's motion to dismiss is granted. No decision is reached on plaintiffs' motion for summary judgment or defendant's motion for summary judgment. This cause is now dismissed.

Entered this 25th day of January, 1974.

/s/ JESSE E. ESCHBACH

United States Dristrict Judge